

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 08-003979

Employee: Sharon M. Parker

Employer: Northwest Missouri Psychiatric Hospital (Settled)

Insurer: CARO (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 26, 2011. The award and decision of Chief Administrative Law Judge Nelson G. Allen, issued August 26, 2011, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this _____ 19th _____ day of April 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Sharon M. Parker

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be modified and employee should be awarded permanent total disability benefits against the Second Injury Fund.

First, there is no dispute that employee suffered an accident that arose out of and in the course of her employment on January 19, 2008, and that the injuries resulting from said accident combined with employee's preexisting disabilities to trigger Second Injury Fund liability. The issue is whether the combination of employee's primary injury and preexisting disabilities resulted in permanent and total disability.

Dr. Koprivica provided the only medical expert permanent disability ratings for employee's primary injury and preexisting disabilities. Dr. Koprivica opined that as a result of the primary injury employee sustained 30% permanent partial disability of her left shoulder and 10% permanent partial disability of the body as a whole referable to her lumbar spine. With regard to employee's preexisting disabilities, Dr. Koprivica opined that at the time of the primary injury employee suffered from 15% permanent partial disability of her right knee and 5% permanent partial disability of the body as a whole referable to her lumbar spine.

As to employability, Dr. Koprivica opined that employee was capable of doing home health aide activities for ambulatory individuals as she is currently doing, but that this "would represent her ability to access the open labor market." Dr. Koprivica stated in his report that he would defer to a vocational expert if there is a debate about her employability.

Ms. Titterington, the only vocational expert retained in this case, evaluated employee on March 29, 2010. Ms. Titterington noted that employee had difficulty stooping, squatting, and bending and that she needed the assistance of coworkers to complete many of her job duties. Ms. Titterington also noted that employee had been working for the prior 10 years as a personal care assistant.

Ms. Titterington indicated that employee's part-time job is on an "on call" basis, does not require a routine set number of hours, and that it is only because of this arrangement that employee is able to perform in this position. Ms. Titterington also noted that "Dr. Koprivica's assessment does not allow [employee] to continue to perform this job as she performs it." Ms. Titterington further noted that retraining was not a realistic option for Ms. Parker due to her restrictions and her age. Ms. Titterington stated that employee could not return to her previous job due to physical limitations and that her limited job for Unity Homes "is not considered a valid representation of a companion's duties as it is typically performed in the open labor market." Ms. Titterington ultimately concluded that employee is unable to work full-time at a competitive rate.

The Second Injury Fund did not provide any contradictory expert evidence.

Employee: Sharon M. Parker

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Permanent and total disability is defined by § 287.020.6 RSMo¹ as the “inability to return to any employment”

The test for permanent total disability is whether, given the employee’s situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person’s present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo. App. 1995) (citations omitted).

Dr. Koprivica opined that due to employee’s permanent disabilities she is significantly restricted from further employment, but did state that she could continue working in her current position. However, Dr. Koprivica also deferred to a vocational expert as to employability. The only vocational expert to render an opinion regarding employability, Ms. Titterington, opined that employee’s current position is not typical and that she could not compete in the open labor market. In addition, Ms. Titterington opined, contrary to Dr. Koprivica’s assessment, that under Dr. Koprivica’s restrictions employee would not even be able to continue performing her current job.

In light of the expert opinions of Dr. Koprivica and Ms. Titterington, and the record as a whole, I believe that as a result of the combination of employee’s primary injuries and preexisting disabilities she is permanently and totally disabled. As such, I would modify the award of the ALJ merely awarding employee permanent partial disability benefits and award employee permanent total disability benefits against the Second Injury Fund.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member

¹ Statutory references are to the Revised Statutes of Missouri 2007 unless otherwise indicated.

AWARD

Employee: Sharon M. Parker

Injury No.: 08-003979

Employer: Northwest Missouri Psychiatric Hospital (Settled)

Additional Party: The Treasurer of the State of
Missouri as Custodian of the Second Injury Fund

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri

Insurer: CARO (Settled)

Hearing Date: August 6, 2011

Checked by: NGA

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 19, 2008.
5. State location where accident occurred or occupational disease was contracted:
Buchanan County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or
occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the
employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was a psychiatric aid and fell on the ice while walking from one of the employer's buildings to another.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Left shoulder and back and body as a whole.
14. Nature and extent of any permanent disability: Claimant's permanent partial disability of 30 percent of the left shoulder at the 232-week level combined with prior disabilities of 15 percent of right knee and five percent body as a whole for a back injury resulting in an enhancement of 11.36 weeks of disability.
15. Compensation paid to-date for temporary disability: \$139.71.
16. Value necessary medical aid paid to date by employer/insurer? \$10,304.15
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: \$382.65 per week for permanent partial disability.
20. Method wages computation: by stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: None. Employee's claim against Employer settled previously.
22. Second Injury Fund liability:

11.36 weeks of permanent partial disability from Second Injury Fund x \$382.65 = \$4,346.90.

TOTAL: \$4,346.90.

23. Future requirements awarded: None.

Said payments to begin January 20, 2008 and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Christine M. Kiefer.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Sharon M. Parker

Injury No.: 08-003979

Employer: Northwest Missouri Psychiatric Hospital (Settled)

Additional Party: The Treasurer of the State of Missouri
as Custodian of the Second Injury Fund

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri

Insurer: CARO (Settled)

Hearing Date: August 6, 2011

Checked by: NGA

Prior to presenting evidence, the parties stipulated that the only issue to be determined by this hearing was the liability, if any, of the Second Injury Fund.

The parties agreed that on January 19, 2008, Sharon M. Parker was an employee of Northwest Missouri Psychiatric Hospital. The employer was operating under and subject to the provision of the Missouri Workers' Compensation Law and was fully insured by CARO.

The parties also agreed that on January 19, 2008, the claimant sustained an injury by accident or occupational disease arising out of and in the course of her employment. The employer had proper notice of claimant's injury and a timely Claim for Compensation has been filed.

The parties further agreed that the correct rate of compensation is \$382.65 per week. Compensation has been provided in the amount of \$139.71 for three-sevenths of a week. Medical aid has been furnished in the amount of \$10,304.15.

The claimant testified in person. She is five feet five and one-half inches tall and on October 8, 2009 weighed 269 pounds. She had worked for Northwest Psychiatric Hospital as a psychiatric aid for 20 years one month. Her last day at work was the date of her injury January 19, 2008. She was responsible for drawing up lesson plans, teaching classes and giving hands on training in the area of home economics.

On January 19, 2008, the claimant during her employment went outside to walk to another of the employer's buildings. She fell on an icy sidewalk and landed on her back and left shoulder. She had pain in her lower back and left shoulder.

Dr. Distefano performed surgery on claimant's left shoulder on November 3, 2008 which included a SLAP repair, left distal clavicle resection and subacromial decompression. She had a steroid injection following the surgery and had an adverse reaction to it. A direct manipulation was performed in January 2009 to relieve a frozen shoulder.

She continues to suffer pain and loss of motion with her left shoulder and her lower back causes her pain. She said she still has pain in her lower spine that is severe. The surgery was never performed on her back.

Following her release from treatment, the claimant reported constant pain in the shoulder area and numbness from the fingers all the way to the upper arm and bicep area. She reports sharp pains in the shoulder and that the pain in this area stays at the level of an 8 or 9 on a 10-point scale. While surgery relieved some of the pain she had in the chest area, she feels very little relief in the shoulder and reports that she is unable to reach overhead, unable to reach behind her, and has difficulty raising her arm straight out beside her. She also reports that before this injury she did have low back pain at a three or four, but after the fall it stays about an eight or eight and one-half.

Dr. Koprivica evaluated the claimant on October 3, 2009. He prepared a report noting that the claimant had persisting left shoulder problems and noted that the pain changed with the weather and that she occasionally has a sharp pain that will feel like a heart attack. He noted that her activities and capabilities are limited, that she had loss of motion in her left shoulder, and that her sleep was disrupted due to shoulder pain as well. He found the claimant to be at maximum medical improvement and opined that the claimant had a 30 percent partial disability of the left upper extremity at the level of the left shoulder. (Employee's Exhibit M, Report p. 22) He also provided a rating of ten percent permanent partial disability of the body as a whole referable to the low back as the result of the injury of January 2008. He examined and evaluated the claimant and noted that her back pain was at a much greater level than before the fall of 2008 and that she had episodes where her back would lock up, a symptom she did not previously have. Dr. Koprivica also noted that the claimant's lifting and carrying capabilities were significantly reduced because of both the left shoulder and back injuries together.

In 1993, the claimant was at work and walking down a flight of stairs. She fell and struck her right knee and was treated with heat and ultrasound at Health South Physical Therapy. She also had one injection which relieved her pain for only 24 hours. She reported that the pain in her right knee travels to the back of her knee and down her calf. During the time she treated with physical therapy, she also was told to wear a brace, which she did, but received no further treatment. Since 1993, her knee will frequently give out on her and cause her to fall. She testified that going "upstairs was difficult, and downstairs almost impossible." She reported that at her place of employment she was

able to use an elevator between 1993 and 1997, but after that time she was required to navigate stairs which was very difficult for her. The claimant did not receive any type of settlement related to this injury.

She reported that afterwards she had significant trouble and no longer participated in activities like crawling or squatting. She also testified that prior to this injury she frequently went walking and biking with her small children and that these activities were virtually stopped entirely. She began taking ibuprofen to alleviate her knee pain and was able to modify her schedule at work so that she was supervising clients instead of having to do some of the more manual work herself. She also reported that she would frequently ask her students to help her with things like lifting, reaching or bending.

Dr. Koprivica evaluated the claimant's knee and noted on examination that she was unable to step with her right leg onto the stepstool. He noted that she had to stop and turn around and step up with the left leg to protect the right knee. He also noted that Ms. Parker was unable to toe or heel ambulate and that she was unable to squat. Dr. Koprivica opined that predating the work injury of January 2008, Ms. Parker had a history of degenerative disease involving the right knee which was "a significant industrial disability." He believed that she had an obstacle to re-employment in terms of squatting, crawling, kneeling and climbing and assigned a 15 percent permanent partial disability of the right lower extremity at the level of the knee.

In 1997, the claimant was at work sitting on a faulty stool and leaning on a counter. She reported that the stool broke from underneath her and that she caught herself on the countertop with her arms. Upon doing that, she "felt something give in her low back" due to the weight of her body. The claimant treated at Occupational Health and Dr. Cathcart diagnosed a lumbosacral strain with radiculopathy. She was given a Toradol injection and continued to treat with Dr. Cathcart who eventually ordered an MRI. The MRI revealed a right-sided protrusion at the disc at L4-L5 that extended into the lateral recess. The claimant received ongoing physical therapy and was offered further injections, which she refused because she believed that she had a negative reaction to the injection.

The claimant also reported that she went to a chiropractor on her own which helped somewhat, but did not alleviate the low back pain completely. She also testified that she saw a surgeon who advised her that back surgery would not help her symptoms. The claimant reported that her back "frequently goes out" since 1997 and that after this injury she completely took out all of her leisurely walking, biking and other outdoor activities. She asks for help from others every time there is a need to bend over and pick something up in her home, and reports that she has not slept in a bed since 1997. The claimant testified that this injury has caused such low back pain and an inability to get in and out of the bed that she has slept in a recliner every night since 1997. She also reports

that she sleeps very little and is up and down all throughout the day and night to alleviate her pain.

Ms. Parker testified that she settled this 1997 workers' compensation claim for a five percent of the body as a whole. She also testified that after this injury she had continued difficulty lifting, bending, and stooping on the job and continued to ask patients or colleagues for help in many of her duties.

Dr. Koprivica evaluated the claimant and agreed that the five percent permanent partial disability apportioned for the pre-existing disability was appropriate. Dr. Koprivica also concluded that "when one combines a pre-existing industrial disability with the additional disability attributable to the primary injury of January 19, 2008, significant enhancement of the combined disabilities arises above the simple arithmetic sum of the separate disabilities." (Employee's Exhibit M, Report pp. 23-24) Dr. Koprivica opined that Ms. Parker was capable of doing home health aide activities for ambulatory individuals as she is currently doing, but that this "would represent her abilities to access the open labor market." He also deferred to a vocational expert for further opinion on this area.

The claimant was evaluated by vocational expert, Mary Titterington, on March 29, 2010. Ms. Titterington is a certified disability management specialist, a member of the Vocational Evaluation and Work Adjustment Association and has been working as a vocational rehabilitation consultant since 1987. (Employee's Exhibit L) She reviewed medical records and provided vocational testing to the claimant as well.

Ms. Titterington outlined the claimant's diagnoses and physical limitations and noted that the claimant had difficulty performing her job leading up to the injury of 2008. She noted that the claimant had difficulty stooping, squatting, and bending and that she needed the assistance of co-workers to complete many of her job duties. She also noted that the claimant has been working for the last ten years as a personal care assistant.

Ms. Titterington indicated that the claimant's part-time job is on an "on call" basis, does not require a routine set number of hours, and that it is only because of this arrangement that Ms. Parker is able to perform in this position. Ms. Titterington also noted that: "Dr. Koprivica's assessment does not allow her to continue to perform this job as she performs it." (Employee's Exhibit L, p.7) Ms. Titterington also noted that retraining was not a realistic option for Ms. Parker due to her restrictions and her age. Ultimately, Ms. Titterington concluded that the claimant could not return to her previous job due to physical limitations and that her limited job for United Homes "is not considered a valid representation of a companion's duties as it is typically performed in the open labor market." She noted that Ms. Parker only works approximately eight hours a week, is only responsible for keeping an autistic woman company and assisting her with

meals, that Ms. Parker sits throughout the majority of her shift, and that there is very little interaction due to the autistic woman's disability. Ms. Titterington concluded that the claimant cannot work in any job as it is customarily performed in the open labor market that she was unable to work full-time at a competitive rate. (Employee Exhibit L, p.7)

On September 29, 2010, the claimant settled her January 19, 2008 claim against Northwest Missouri Psychiatric Hospital based on 20 percent of left shoulder and 4.73 percent body as a whole referable to the low back.

I believe Dr. Koprivica in that I find that as a result of the claimant's accident on January 19, 2008, the claimant did sustain a permanent partial disability to her left shoulder in the amount of 30 percent at the 232-week level or 69.6 weeks. However, I do find that the settled amount of 4.73 percent body as a whole is a more accurate figure of claimant's disability to her back injury than Dr. Koprivica's ten percent. I find that these injuries were a hindrance to her employment and an obstacle to her receiving employment in the future.

I also agree with Dr. Koprivica that as a result of her 1993 injury to her right knee, she has sustained a 15 percent partial disability to her left knee or 24 weeks of compensation. I find and believe from the evidence that this disability was a hindrance to her employment and an obstacle to her receiving new employment.

The claimant's present position is limited to 62 hours a month, by the rules of her employer, not by the claimant. The claimant is receiving Social Security payments because of her age and State of Missouri retirement because of her age and years of meritorious work. The claimant has earned these benefits and is entitled to them, but they are never-the-less motivation not to be fully employed.

The claimant argues that her present position as a companion for an autistic person and her aged mother is unique because of the lack of physical effort involved. I believe there are many other positions the claimant can handle. She is intelligent and versified. She has even taught classes, I believe that the claimant is able to compete in the open labor market for employment. I do not believe Mary Titterington in this case.

I do believe that the claimant's injury to her left shoulder on January 19, 2008 resulting in 30 percent partial disability at the 232-week level or 69.6 week does combine with her prior disabilities of 15 percent of the right knee or 24 weeks and five percent body as a whole for her back injury or 20 weeks to cause the claimant to have an enhanced permanent partial disability of 11.36 weeks greater than their separate sums. I do not believe that the claimant's January 19, 2008 injury to her back caused any enhancement to the combined disabilities.

I order and direct the Treasurer of the State of Missouri as Custodian of the Second Injury Fund to pay to the claimant the sum of \$382.65 per week for 11.36 weeks for a total of \$4,346.90.

Christine M. Kiefer is hereby assigned a lien in the amount of 25 percent of this Award for necessary legal services provided claimant.

/s/ Nelson G. Allen

Nelson G. Allen

Chief Administrative Law Judge